UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al., Defendants	ECF CASE Civ. No. 05-CV-3212 (ILG) (Glasser, J.) (Pohorelsky, M.J.)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF NOMINAL DEFENDANTS METRO-ILA FUNDS AND MMMCA'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

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Nominal Defendants the METRO-ILA Funds and MMMCA jointly submit this reply memorandum in further support of their motion, pursuant to Fed. R. Civ. P. 8 and 12(b)(6), to dismiss with prejudice the government's Second Amended Complaint (the "Complaint") for failure to state a claim upon which relief can be granted, and in the alternative, to strike certain allegations contained in the Complaint pursuant to Fed. R. Civ. P. 12(f).[1]

INTRODUCTION

Throughout the government's 93-page memorandum in opposition, the Court's decision dismissing the previous complaint is the proverbial "elephant in the room." The government does not even once mention the Court's analysis of the previous complaint because the present Complaint is plagued by the same fundamental defects that resulted in its predecessor's dismissal. The new Complaint is much longer than the previous pleading, contains the same lengthy and irrelevant allegations concerning historical prosecutions on the Waterfront, and, now, incorporates wholesale prior pleadings from other cases, even though the Court warned that doing so necessarily would violate Rule 8(a). The Complaint also, once again, alleges an untenable RICO association-in-fact enterprise, consisting of racketeering defendants and their institutional victims, who cannot possibly share the alleged unlawful purpose of the enterprise: to obtain money and property from the *institutional defendants* and others by extortion and fraud. The government's failure to address the Court's myriad concerns, either in crafting its new pleading or in its memorandum in opposition, makes it plain that its opposition to the present motion to dismiss is nothing more than a thinly-veiled motion for reconsideration. Its attempt to have the Court reconsider its earlier analysis, however, is destined to fail because the Court's decision is correct and grounded in the well-settled law of this and other circuits.

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[1] "Joint Mem." refers to the METRO-ILA Funds and MMMCA's opening memorandum of law. "Gov't. Mem." refers to the government's memorandum in opposition. All abbreviations used in the opening brief are used herein as well, including "ILA" as the abbreviated case name for the Court's opinion in United States v. Int'l Longshoremen's Ass'n, 518 F. Supp. 2d 422 (E.D.N.Y. 2007) (Glasser, J.). The METRO-ILA Funds and MMMCA continue to join in all the arguments of the other Defendants to the extent that they challenge the Complaint for facial deficiencies.

The Complaint should be dismissed, with prejudice, for several reasons. First, it violates Rule 8(a), principally because of its wholesale incorporation of pleadings from other cases, which renders it, as the Court had predicted, "an unintelligible morass of self-contradictory allegations." In its memorandum in opposition, the government addresses each of the Complaint's myriad Rule 8 defects -- prolixity, contradictory assertions, and extraneous historical allegations -- in isolation, and relies on authority that each such defect is not, in itself, a sufficient basis for dismissal. What the government fails to address, however, is the devastating impact of these kinds of deficiencies when they appear in its pleading to such a degree and in such fatal combination. Moreover, the government's reliance on any authority but the Court's prior decision is misplaced because the question of whether a complaint comports with the requirements of Rule 8 is necessarily a pleading-specific inquiry. This Complaint not only assumes, but magnifies the defects of its predecessor, which already fell afoul of Rule 8, and, so, is fatally defective.

The government's empty claim that the incorporated pleadings and lengthy historical allegations are necessary to place its present RICO claims into context is disingenuous and belied by its failure to identify specifically how they provide any context to those claims. Rather, it is apparent that the Complaint's obvious technical defects are designed to obscure the profound substantive defects in its RICO claims such as the failure to allege the existence of a cognizable RICO enterprise as well as facts sufficient to establish a basis for the dramatic coercive relief that it seeks against MMMCA, the METRO-ILA Funds, and the other institutional "nominal" defendants.

The Complaint alleges no facts that would support the inference that the institutional defendants -- whom the government concedes are victims that did not engage in any wrongdoing -- shared in the enterprise's alleged core purpose to victimize themselves and others. The government is forced to concede that the members of an association-in-fact enterprise must share a common purpose because that sensible limitation on the scope of a RICO enterprise is well settled. In arguing that the amorphous Waterfront Enterprise is a viable construct, the government relies principally on a First Circuit case, United States v. Cianci, for the proposition that, in certain circumstances, the unlawful common purpose of an enterprise and its racketeering defendant members may be imputed to the legal entities they control. That is not the law in this Circuit, which, where a Section 1962(c) type violation is alleged, requires that members of an association-in-fact enterprise share a common illegal goal.

Cianci is inapposite for two additional reasons: First, the Complaint does not allege facts that would support the claim that any of the racketeering defendants controlled the METRO-ILA Funds and MMMCA to the degree where, as in Cianci, the entity became the very vehicle for racketeering activity alleged in the government's initial pleading. Second, the court in Cianci was never asked to address the core question presented in this case: whether racketeering defendants and their victims may be part of the same association-in-fact enterprise. Thus, even assuming that the limited holding of Cianci is sound, the government has offered no good reason for the Court to apply that rationale here, and, as this Court described it, to "stretch the boundaries of a racketeering enterprise beyond all recognition." It certainly has not explained why this Court should jettison the carefully reasoned analysis that led it to conclude that the previous version of the government's shapeless Waterfront Enterprise is not a proper RICO enterprise.

Finally, the government does not explain in its opposition how the Complaint's allegations of ever more remote, isolated, almost random instances of misconduct affecting one or more of the METRO-ILA Funds -- and no racketeering acts involving or even touching MMMCA -- even taken as true, would enable it to obtain the sweeping relief it seeks against them. It merely argues that it is "premature" to litigate the propriety of relief on a motion to dismiss. Yet where, as here, the METRO-ILA Funds and MMMCA are named solely as nominal defendants, parties who are included only for the purposes of relief, it is perfectly appropriate to determine at the pleading stage whether the Complaint alleges a sufficient basis for that relief. Here, none of the current trustees, directors, or employees of the METRO-ILA Funds, and none of the officers or employees of MMMCA are named as racketeering defendants. Moreover, the racketeering acts that are alleged to have victimized the METRO-ILA Funds occurred between eight and twelve years ago and principally involved one former Trustee. No court has ever imposed coercive and expensive judicial oversight in even remotely similar circumstances.

For these reasons, as more fully set forth below, the Complaint should be dismissed against the METRO-ILA Funds and MMMCA, and should be dismissed with prejudice.

ARGUMENT

I. The Second Amended Complaint Violates Rule 8(A).

Having flouted the Court's meticulous guidance as to how it might cure the staggering Rule 8 deficiencies in its previous pleading, the government does not mention, much less address the Court's analysis in its memorandum in opposition. Its decision to ignore the Court's memorandum and order is ill-advised. The question of whether a complaint satisfies the requirements of Rule 8 is a matter that must be determined on a case-by-case basis, considering the nature of the action, the relief sought, and the respective positions of the parties in terms of the availability of information. See Wright & Miller, 5 Fed. Prac. & Proc. Civ. 3d § 1217. There is no standard metric and, "what is the proper length and level of clarity for a pleading cannot be defined with any great precision and is largely a matter that is left for the discretion of the trial court." Id.[2] Given the trial court's necessarily broad discretion in these matters, it is axiomatic that the most persuasive authority by far on the question of whether this Complaint passes muster under Rule 8(a) is this Court's own detailed analysis of the previous complaint, which involved virtually the same allegations, parties, and exhibits that are included in the current Complaint.

Instead of addressing the Court's concerns and following its guidance as to future pleadings in this case, the government attempts to defend its current pleading by relying on other cases for some basic principles regarding defects in pleading and their cures: "prolixity" or "[v]olume alone, without more" does not warrant dismissal of a complaint (Gov't Mem. at 48, 50); the matter of contradictory assertions should not be resolved at the pleading stage (Id. at 48); and, allegations of historical ties to organized crime are appropriate in organized crime cases (Id. at 49). As an initial matter, the cases cited by the government dealt with complaints that were considerably shorter than this Complaint.[3] Further, the government does not cite any case -- and we have found no case -- in which a court approved the wholesale incorporation of pleadings from other cases, and certainly not to the degree that the government has incorporated other pleadings in the Complaint here. Indeed, the fundamental flaw with the government's myopic defense of its pleading is that the Complaint suffers not merely from prolixity alone, or from contradictory assertions alone, or from irrelevant allegations alone, but from all of these things exponentially, and in fatal combination:

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[2] Indeed, the Court of Appeals has held that a district court has discretion to dismiss a complaint with prejudice under Rule 8, particularly where "leave to amend has previously been given and the successive pleadings remain prolix and unintelligible." Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988).

[3] See Bennett v. Schmidt, 153 F.3d 516 (7th Cir. 1998) (12-page complaint); 916 Radio v. F.C.C., No. 05-719, 2005 WL 2114187 (E.D. Cal. 2005) (14-page complaint with 42 pages of exhibits). The courts in both Bennett and 916 Radio distinguished the complaints at issue with lengthier complaints in other cases that courts held violated Rule 8(a): In Bennett, the court cited the following cases in which courts dismissed lengthy complaints under Rule 8(a): In re Westinghouse Sec. Litig., 90 F.3d 696, 702-03 (3d Cir. 1996) (dismissing 240-page, 600-paragraph complaint); Kuehl v. FDIC, 8 F.3d 905 (1st Cir. 1993) (dismissing 43-page, 358-paragraph complaint); and Michaelis v. Nebraska State Bar Ass'n, 717 F.2d 437, 439 (8th Cir. 1983) (dismissing 98-page 144-paragraph complaint). Similarly, in 916 Radio, the court cited: Hartz v. Friedman, 919 F.2d 469 (7th Cir. 1990) (holding that 125-page complaint violated

(Footnote continued)

- It is prolix: even without exhibits, it is, at 148 pages, almost twice as long as its 85-page predecessor, and including the additional 403 pages of exhibits attached to it, most of which the Complaint incorporates wholesale by reference, it is about five times longer.

- It is "burdened with lengthy discussions of the history and operations of La Cosa Nostra generally, as well as discussions of government investigations and prosecutions of organized crime activity on the Waterfront going back several decades." (ILA, 518 F. Supp. 2d at 426.)

- It incorporates by reference ten of twelve lengthy exhibits in their entirety and large portions of another lengthy exhibit, a way of pleading that the Court has criticized as unwieldy, burdensome, "utterly incoherent," and "particularly inappropriate in a RICO case." (Id. at 462-64, and n.72 and n.76.). The exhibits attached to and incorporated in this Complaint are largely the same in which the Court failed to see "any value whatsoever." (ILA at 466, n.78.).

- Far from an "appropriately tailored" selection (Gov't Mem. at 51), the incorporated allegations, as the Court previously recognized, are "packed with redundant and to some degree mutually inconsistent factual allegations," and render the Complaint "an unintelligible morass of self-contradictory allegations." (Id. at 462, n.72.)

- The Complaint alleges that the institutional defendants were directed by the leaders of the Enterprise "in carrying out unlawful and other activities in furtherance of the conduct of the Enterprise's affairs." (SAC ¶ 80.) That vague allegation not only fails to provide clear notice of the government's claims, but to the extent it alleges wrongdoing by the institutional defendants, it is inconsistent with their status as nominal parties in this case.[4]

Rule 8(a)); Washington v. Baenziger, 656 F. Supp. 1176 (N.D. Cal. 1987) (dismissing 86-page complaint); Soghomnian v. United States, 82 F. Supp. 2d 1134 (E.D. Cal. 1999) (holding 87-page complaint violated Rule 8(a)); and Westinghouse Sec. Litig., 90 F.3d at 702-03.

[4] Although MMMCA and the METRO-ILA Funds raised this argument in their opening submission (Joint Mem. at 10-11), the government does not address it in its memorandum in opposition.

The government argues that its lengthy historical allegations concerning "Waterfront Prosecutions" and wholesale ingestion of prior pleadings are necessary to provide "context." See Gov't Mem. at 48-51. Yet the government cannot explain: (1) why it must incorporate hundreds of pages of pleadings in prior criminal and civil RICO cases merely to "demonstrate the existence of those prosecutions, and the factual underpinnings of those allegations" (Id. at 50); (2) how those voluminous, extraneous materials "provide the factual basis that underlies the present pleading and its legal and factual content" (Id.); or (3) why each of the prosecutions listed in the nineteen pages of allegations concerning historical "Waterfront Prosecutions" are at all relevant or necessary to its claims here.[5] And while the government contends that it did not intend to engraft the legal theories of the other cases whose pleadings it has incorporated into the Complaint, the Complaint nonetheless expressly incorporates by reference allegations that contain those legal theories.[6] In effect, the government argues that it is appropriate to leave it to the defendants, and the Court, to guess which particular allegations among the hundreds incorporated into the Complaint are relevant to the present case.

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[5] Because the allegations concerning "Waterfront Prosecutions" are immaterial, in the event the Court does not dismiss the Complaint, they should be stricken under Rule 12(f). See Joint Mem. at 27-28. The government claims that the Defendants "cannot satisfy the stringent standard to strike these allegations" under Rule 12(f) because they cannot show that no evidence in support of the allegation would be admissible. Gov't Mem. at 50. But this Court already has expressed substantial reservations about the propriety of pleading these very same allegations in the previous complaint. See Joint Mem. at 27-28. The government never explains in its opposition why each, or even any, of the allegations are relevant to its present RICO claim, which involves a conspiracy that allegedly started in 1995. To make matters worse, the Complaint expressly incorporates eight additional pages of redundant historical allegations from the ILA Local Civil RICO Case. See Joint Mem. at 8.

In arguing that its Complaint should not be dismissed under Rule 8, the government quotes language from this Court's opinion in Giuliano v. Everything Yogurt, Inc., 819 F. Supp. 240, 246 (E.D.N.Y. 1993), for the proposition that where the deficiency in a pleading is that it contains too much detail, the court should generally strike the redundant or immaterial matter rather than dismiss the Complaint. See Gov't Mem. at 48, n. 10. Yet, in this case, after the government has been given a second opportunity to cure its pleading deficiencies, "the Court should not have to cull out the material from the immaterial." Gilbert v. General Motors Corp., 1 F.R.D. 101, 102 (W.D.N.Y. 1940).

[6] For example, the government incorporates allegations of three different RICO enterprises from pleadings in other RICO cases. Each of those alleged enterprises are inconsistent with the "Waterfront Enterprise" alleged in the body of the Complaint, as well as with each other. See Joint Mem. at 9.

In the end, the government declines to take any responsibility for these myriad and serial deficiencies in its pleading. Remarkably, it lays the blame for the Complaint's inordinate length on "the magnitude of wrongdoing that has so long plagued the Waterfront." (Gov't Mem. at 50-51.) In fact, the government's cumbersome and disjointed mass of pleadings is nothing more than a ruse designed to conceal the fatal weaknesses in its RICO claims, including the dearth of allegations suggesting continuing, or even recent, wrongdoing, and, most evidently, the failure to allege a viable association-in-fact enterprise. The Court should dismiss the Complaint under Rule 8 with prejudice.

II. The Second Amended Complaint Does Not Plead a Cognizable RICO Association-In-Fact Enterprise

The government concedes -- as it must -- that a complaint pleading an association-in-fact enterprise must allege a common purpose uniting its members. See, e.g., First Capital Asset Mgmt., Inc. v. Satinwood, Inc., 385 F.3d 159, 174 (2d Cir. 2004) ("[f]or an association of individuals to constitute an enterprise, the individuals must share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes"). The common purpose requirement "limits the potentially boundless scope of the word 'enterprise;' it distinguishes culpable from non-culpable associations." Ryan v. Clemente, 901 F.2d 177, 180 (1st Cir. 1990) (Breyer, J.); see also ILA, 518 F. Supp. 2d at 476 (refusing to "abet the Government's effort to stretch the concept of a racketeering enterprise beyond all recognition in order to bring various otherwise disinterested parties within its scope.") Even United States v. Turkette, 452 U.S. 576 (1981), which the government relies upon for the proposition that the RICO statute "shall be liberally construed to effectuate its remedial purposes," affirmed the "common purpose" requirement as a sensible limitation on the scope of a proper association-in-fact enterprise. Id. at 583.[7] Accordingly, failure to allege facts sufficient to demonstrate that members of an association-in-fact enterprise share a common purpose dooms a Section 1962(c) RICO claim. See, e.g., Baker v. IBP, Inc., 357 F.3d 685 (7th Cir. 2004).

The Seventh Circuit's decision in Baker illustrates the common purpose requirement for association-in-fact enterprises. In Baker, plaintiffs alleged that the defendant employer, a meat processing concern, violated the RICO statute by knowingly employing undocumented, illegal aliens in an effort to decrease the company's overall labor costs. Id. at 686-87. The alleged association-in-fact enterprise consisted of the defendant, as well as certain recruiters and immigrant welfare organizations who helped the defendant hire the undocumented workers. Id. at 691. The Seventh Circuit affirmed dismissal of the complaint on the ground that it failed to allege facts demonstrating a common purpose among the enterprise's members, an "essential ingredient" of a RICO claim. Id. As the court explained, the defendant "wants to pay lower wages; the recruiters want to be paid more for services rendered (though [defendant] would like to pay them less); the [immigrant welfare organization] wants to assist members of its ethnic group. These are divergent goals." Id.

The "divergent goals" of the racketeering defendants and their institutional victims in the Waterfront Enterprise are even starker than those of the members of the alleged enterprise in Baker. In the Waterfront Enterprise, the alleged common purpose of the members of the enterprise is "to obtain money or other property on the Waterfront and the Port of Miami through extortion or fraud," including money and economic benefits in plan transactions from ILA-sponsored ERISA benefit funds, and the rights of those funds and their participants to the honest services of the funds' fiduciaries. See SAC ¶ 73. Thus, the METRO-ILA Funds and MMMCA, by the government's own description, are the actual victims of the Waterfront Enterprise's unlawful purpose. The racketeering defendants may share a common purpose among themselves; the racketeering defendants and their institutional victims, on the other hand, obviously do not.

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[7] Although the government, of course, is correct that RICO was designed to address the problem of organized crime infiltration of labor unions, the government does not have license to "stretch the concept of a racketeering enterprise beyond all recognition . . . even for the worthwhile purpose of combating organized crime on the Waterfront." ILA, 518 F. Supp. 2d at 477; see also P.M.F. Servs., Inc. v. Grady, 681 F. Supp. 549, 555 (N.D. Ill. 1988) ("[T]here is no reason . . . to treat civil RICO as though it falls wholly outside the legal principles that normally apply to statutes and their application.")

The government disregards the Court's opinion in ILA, but offers no reason or sound authority why this current version of the "Waterfront Enterprise" should fare any better than its predecessor. The government also ignores other soundly reasoned cases like Crab House of Douglaston, Inc. v. Newsday, 418 F. Supp. 2d 193, 204 (E.D.N.Y. 2006), and Hansel 'N Gretel Brand, Inc. v. Savitsky, No. 94 Civ. 4027, 1997 WL 543088, at *3 (S.D.N.Y. Sept. 3, 1997), both of which dismissed RICO claims where, as here, the alleged enterprises comprised alleged racketeers and their victims and the purpose of the enterprise was to bilk those victims. These cases, as well as the Court's opinion in ILA, are supported by both common sense and the law in this Circuit, and elsewhere.

The government attempts to salvage the most recent iteration of its Waterfront Enterprise by trying to carve out an exception to the common purpose requirement. It argues that racketeering defendants and victim legal entities may be members of the same association-in-fact enterprise where the entities are controlled by the racketeering defendants. The authority on which the government relies for its claim, however, does not support the unwarranted expansion of the concept of a RICO association-in-fact enterprise that it presses this Court to endorse. To begin with, almost all of the decisions that the government relies upon for its assertion that entities like municipalities "have previously and repeatedly been accepted as proper *components* of a RICO enterprise," (Gov't Mem. at 37) (emphasis added) actually address whether a municipal entity could constitute a *legal entity* type of enterprise, not whether it may be a component of an association-in-fact enterprise like the Waterfront Enterprise.[8]

The government relies principally on United States v. Cianci, 378 F.3d 71 (1st Cir. 2004), for its claim that racketeering defendants and their victims can be members of an association-in-fact enterprise. Cianci involved a criminal RICO prosecution against the former mayor of Providence, Rhode Island, another City official, and a contractor whose company performed a substantial amount of work for the City. Id. at 77. The indictment alleged an association-in-fact enterprise consisting of the racketeering defendants as well as the City and its agencies, who, unlike the institutional defendants here, were not parties to the action. Id. at 79. The alleged purpose of the enterprise was to enrich the mayor and the other defendants through extortion, mail fraud, bribery, money laundering, and witness tampering. Id. at 80. The First Circuit addressed the limited question of whether a municipality, which lacks the legal capacity to form an unlawful intent, could be part of an association-in-fact enterprise where the charge is a Section 1962(c) type violation. Id. at 82. The court said it could, but in doing so, agreed with the view in this Circuit that members of an association-in-fact enterprise must share a common purpose. Id. The court held that because the racketeering defendants effectively controlled the City and its agencies, their unlawful purpose could be imputed to the municipal entities which they controlled. Id. at 82-84. One factor in the court's decision to impute improper purpose was the racketeering defendants' obvious and uncontested control of certain City entities, including the Board of Tax Assessment Review, the Department of Planning and Development, the Redevelopment Authority, and the Police Department's tow list. Id. at 86-87.

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[8] See, e.g. DeFalco v. Bernas, 244 F.3d 286, 306-09 (2d Cir. 2001) (concluding that the Town of Delaware, itself, the "only enterprise alleged by plaintiff," could constitute a legal entity type enterprise under 18 U.S.C. § 1961(4)); United States v. Angelilli, 660 F.2d 23, 30-35 (2d Cir. 1981) (concluding that the Civil Court of the City of New York could constitute a legal entity type enterprise); United States v. Warner, 498 F.3d 666, 696-97 (7th Cir. 2007) (concluding that the State of Illinois could constitute a legal entity type enterprise, even though a court could not "dissolve" it under 18 U.S.C. § 1964(a)).

United States v. Blanford, 33 F.3d 685 (6th Cir. 1994), is similarly inapposite because it does not address the "common purpose" requirement or whether an association-in-fact enterprise may comprise both racketeering defendants and their victims.

Of course, Cianci is not the law of this Circuit and no court here has endorsed its reasoning. Yet even if Cianci were controlling law, it is distinguishable. The Complaint here fails to allege any facts that would support the claim that the racketeering defendants in this case exercise the kind of domination and control over the institutional defendants that Cianci and his accomplices exercised over certain City agencies. For example, none of the current officers, directors, and employees of MMMCA, or the trustees and employees of the Funds, is named as a racketeering defendant; none of the racketeering acts is alleged in any way to have involved or affected MMMCA; and the three sporadic, almost random schemes to defraud the Funds in the distant past do not suggest anything approaching control of MMMCA or the Funds by the racketeering defendants. Quite to the contrary, rather than dominating and controlling the institutions to the point, as in Cianci, that the racketeering defendants transformed them into the very instruments of their racketeering, in this case, the racketeering defendants allegedly victimized the institutional defendants by actively concealing their unsavory purposes and associations from those who were charged with operating those institutions.

Cianci is also distinguishable because the First Circuit did not address directly the core issue that is presented in this case: whether racketeering defendants and the actual victims of an unlawful purpose association-in-fact enterprise can be members of the same enterprise.[9] Here, the institutional defendant victims not only do not share the goals of the racketeering defendant members of the Enterprise, but their interests are diametrically opposed. In these circumstances, unlawful common purpose cannot and should not be imputed to them.

When all is said and done, the government has failed to muster any authority that supports its attempt to "stretch the concept of a racketeering enterprise beyond all recognition." ILA, 518 F. Supp. 2d at 477.[10] The Court should dismiss the Complaint with prejudice for its failure, once again, to allege a valid association-in-fact RICO enterprise.[11]

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[9] There is nothing to suggest from its opinion that the court in Cianci ever was asked to consider the question whether an institutional victim and its victimizing racketeers may be part of the same unlawful purpose enterprise. Certainly, the issue could not have been presented as starkly since -- as the court went to obvious pains to note -- the City was not a defendant in the prosecution, and was not subject to civil or criminal liability. Id. at 88. Whether the institutional defendants in this case are part of the alleged association-in-fact enterprise, on the other hand, is of considerable consequence to the future of each of these organizations. See Gov't Mem. at 35.

[10] The government's reliance on isolated language that is quoted in Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A., 30 F.3d 339, 344 (2d Cir. 1994), is misplaced. Certainly nothing in Riverwoods, or in the case from which it quotes, Bennett v. U.S. Trust Co., 770 F.2d 308, 315 (2d Cir. 1985), both of which discuss the "distinctness" requirement under Section 1962(c) "presupposes that an enterprise may be made up of 'innocent' or 'victim' entities, as well as the perpetrators." Gov't Mem. at 38. Riverwoods says nothing about an enterprise consisting of victims as well as perpetrators; nor, for that matter, does the "distinctness" requirement of Section 1962(c) itself undermine or diminish the requirement that members of an association-in-fact enterprise share a "common purpose."

The government also quotes language from Enzo Biochem, Inc. v. Johnson & Johnson, No. 87 Civ. 6125 (KMW), 1990 WL 136038, at *6 (S.D.N.Y. 1990), for the proposition that racketeering defendants and their victims may be part of the same association-in-fact enterprise. In that case, however, the court held that RICO does not require that members of an association-in-fact enterprise share a common purpose. Id. at *5-*6. That holding, is, of course, not only at odds with the Supreme Court's opinion in Turkette, 452 U.S. at 583, the Second Circuit's opinion in First Capital, 385 F.3d at 174, and this Court's decision in ILA, but also the government's concession elsewhere in its memorandum in opposition that members of an enterprise must share a common purpose. See Gov't Mem. at 35.

[11] Contrary to the government's claim, it is also necessary for the Complaint to allege facts sufficient to show that the various members of its enterprise functioned as "a continuing unit." See First Capital, 385 F.3d at 174-75, ILA, 518 F. Supp. at 467-68. Yet the government does not demonstrate in its memorandum in opposition how its alleged enterprise is distinct from the racketeering acts it alleges – a critically important showing where its common purpose allegation is improbable. See Joint Mem. at 15,

(Footnote continued)

III. The Second Amended Complaint Fails To Allege a Sufficient Basis for the Sweeping Relief It Requests Against the METRO-ILA Funds and MMMCA.

The government does not attempt to address the specific arguments raised by the METRO-ILA Funds and MMMCA in their opening submission that the allegations of isolated and sporadic racketeering acts in the distant past -- only affecting the Funds and not MMMCA -- do not come close to suggesting the kind of pervasive and systemic wrongdoing that courts have viewed as a necessary and appropriate predicate for imposing judicial supervision. See Joint Mem. at 16-26. The government's only response appears to be that the nominal defendants' arguments are premature and "have put the cart before the proverbial horse" since they are directed at the relief sought in this litigation. See Gov't Mem. at 86. That claim, however, is disingenuous because the institutional defendants have been brought into this massive and costly RICO litigation not because they are or may be liable, but solely on the ground that they are necessary to effectuate the government's requested relief. The METRO-ILA Funds and MMMCA's motion to dismiss thus addresses whether the allegations in the Complaint, if proven, state a claim for formidable coercive relief under RICO, including forced takeovers of those institutions. This is an appropriate ground for dismissing the action against these defendants under Rule 12(b)(6).[12]

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n.11. Instead, the government once again relies upon the Waterfront Enterprise that Judge Sand held to be sufficiently pleaded and proved in the ILA Local Civil RICO Case. See Gov't Mem. at 42, n.8. The Court, however, has already said that reliance on that ruling here is misplaced. See ILA, 518 F. Supp. 2d at 477, n.91.

[12] Although the government relies on this Court's opinion in the Private Sanitation litigation for the proposition that "challenges to relief at the motion to dismiss stage are premature" in a civil RICO action, Private Sanitation is inapposite because the defendants in that case were racketeering defendants who would be subject to relief if they were found to be liable under RICO. United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 793 F. Supp. 1114, 1130 (E.D.N.Y. 1992) (Glasser, J.).

The government also fails to explain how, given ERISA's comprehensive regulatory scheme and the Department of Labor's close supervision of ERISA benefit funds, the Complaint's sparse allegations of wrongdoing concerning the METRO-ILA Funds would warrant a forced judicial takeover of each of them. Indeed, the government is forced to concede that it is unable to locate a single contested litigation in which a court imposed judicial oversight over ERISA pension and benefit funds.[13] The government certainly provides no good reason why this case should be the first.

The government relies on the Local 560 case for the general proposition -- which the METRO-ILA Funds and MMMCA do not challenge -- that ERISA funds may be named as nominal defendants in civil RICO cases. See Gov't Mem. at 91. Yet Local 560 actually belies the government's argument that judicial supervision of employee benefit funds is appropriate here. In fact, Local 560 demonstrates that courts have been reluctant to sanction forced takeovers of ERISA funds under RICO and do so only in the most extraordinary and extreme circumstances. As is evident from the excerpt that the government includes in its memorandum (and which the METRO-ILA Funds and MMMCA relied upon in their opening submission, at page 24), even though the court found that the union and affiliated trust funds were not vicariously liable under RICO for the acts of their agents, it retained the union as a nominal defendant for the purpose of imposing equitable relief, *but not the affiliated funds*. United States v. Local 560, Int'l Bhd. of Teamsters, 581 F. Supp. 279, 337 (D.N.J. 1984).

[13] Courts generally have exerted control over jointly managed ERISA funds, through negotiated consent decrees, such as in the Mason Tenders case cited by the government, or by virtue of the courts' control over the union that appoints the trustees. See, e.g., Local 560, 581 F. Supp. at 337; United States v. Local 30, 686 F. Supp. 1139 (E.D. Pa. 1988).

Nothing alleged in the Complaint concerning any of the METRO-ILA Funds or MMMCA would suggest, even remotely, the kind of abuse or exploitation of trust funds by organized crime that would commend the appointment of a RICO monitor. See Joint Mem. at 16-26. Accordingly, the Complaint should be dismissed against each of them.

IV. Leave to Amend Should Not Be Granted

The Complaint should be dismissed with prejudice because the government has failed to cure the very same deficiencies with respect to Rule 8(a) and the alleged RICO enterprise that the Court identified in its memorandum and order dismissing the previous complaint. A complaint should be dismissed on Rule 8(a) grounds, with prejudice, "in extraordinary circumstances, such as where leave to amend has previously been given and the successive pleadings remain prolix and unintelligible." Salahuddin, 861 F.2d at 42. Here, the circumstances are indeed extraordinary. By filing a complaint that defies the Court's explicit guidance, and then failing even to address the Court's earlier concerns regarding this kind of pleading, the government does not deserve a third chance to get it right. See, e.g., Roberto's Fruit Market, Inc. v. Schaffer, 13 F. Supp. 2d 390, 397 (E.D.N.Y. 1998) ("[P]laintiffs are admonished that, if their second amended complaint merely recycles the prior two, it will be dismissed with prejudice."). The Court should not hesitate to dismiss the complaint on Rule 8(a) grounds where sophisticated and resourceful counsel defy the express guidance of the court.

Further, even though the Court was "less certain that the Government can adequately allege a cognizable RICO enterprise that includes all of the defendants named herein," it granted "leave to amend should the Government wish to make that attempt." ILA, 518 F. Supp. 2d at 483. In its memorandum in opposition, the government has made it plain that it cannot adequately allege a cognizable RICO enterprise including all of the defendants, and certainly not an enterprise that includes the METRO-ILA Funds and MMMCA.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the METRO-ILA Funds and MMMCA's initial memorandum, the Court should dismiss the government's Second Amended Complaint against each of the METRO-ILA Funds, their respective Boards of Trustees, and MMMCA for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6). In the alternative, pursuant to Fed. R. Civ. P. 12(f), this Court should strike certain allegations because they are immaterial.

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Respectfully submitted,

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